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No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT LAWRENCE RIEGLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Do recipients of packages sent through the international mails have a constitutionally protected expectation of privacy in the unlawful contents of the packages after the packages have been subjected to a lawful customs search and then delivered to the addressee by the police under controlled conditions and constant surveillance?

2. After a search warrant has issued to search a residence for a particular package known to contain contraband, does the Fourth Amendment obligate the police to obtain a second search warrant to open the package when the package is lawfully seized at a place other than the residence described in the warrant?

3. Assuming for the sake of argument that a second search warrant was required in this case, is the exclusionary rule

applicable when government agents act under a good faith belief that an additional warrant was unnecessary because of a prior customs search of the packages and the existence of a warrant authorizing them to search for and seize the contents of the packages?

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OPINION BELOW

The opinion of the California Court of Appeal, Fifth Appellate District, which may be found at 111 Cal.App.3d 580, 168 Cal.Rptr. 816 (1980), appears as Appendix "A" to this petition.

JURISDICTION

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fifth Appellate District, which was entered in this proceeding on October 30, 1980. The Court of Appeal denied petitioner's petition for rehearing on November 25, 1980 (Appendix "B"), and the decision became final as to that court on November 29, 1980. (Rules 24(a) and 28, California Rules of Court.) The California Supreme Court denied the People's petition for hearing on December 24, 1980 (Appendix "C"). The remittitur issued on December 29, 1980.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. Proceedings in the State Court

Respondent Riegler was charged in the Superior Court of the State of California, in and for the County of Merced, with possession of marijuana for sale and transportation of marijuana (CT 423). He pled

not guilty and moved to suppress the evidence (CT 424-448). After a hearing, the superior court denied the motion to suppress. Thereafter, respondent pled guilty to possession of marijuana for sale (California Health and Safety Code, § 11359) and the additional charge was dropped (CT 450-452).

On appeal, respondent challenged the denial of his motion to suppress the drugs. The Court of Appeal of the State of California, Fifth Appellate District, by published decision filed October 30, 1980, reversed appellant's conviction on the grounds that the suppression motion should have been granted (Appendix "A").

The People of the State of California petitioned for rehearing on November 14,

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1980, but rehearing was denied on November 25, 1980 (Justice Andreen was of the opinion rehearing should have been granted) (Appendix "B").

The petition for hearing was timely filed in the California Supreme Court on December 8, 1980, and denied on December 24, 1980 (Justices Mosk, Clark and Richardson voted to grant a hearing)(Appendix "C").

B. Statement of the Facts

On November 8, 1977, specially trained police dogs alerted U.S. Customs officials to the possible presence of marijuana in two packages mailed from Germany to Merced, California. Pursuant to customs laws, officials of the post office and the Drug Enforcement Administration opened the packages and confirmed that they contained hashish. The packages were then resealed and sent to authorities in California (CT 287-292).

Working together, postal authorities and local Merced officials arranged for a controlled delivery of the packages to the addressee, and obtained a search warrant authorizing them to enter that residence and, inter alia, search for and seize the packages and their contents (CT 85-87, 148, 319-320, 375-376). In order to allow the occupants of the residence time to open the packages and exercise dominion over the contents, the police did not immediately execute the search warrant after the delivery of the packages (CT 85-89, 148, 157-160, 249, 277, 319-320, 375-376).

Approximately 15 minutes after the packages were delivered, respondent Riegler and two companions arrived at the residence, and, after a short interval, left with the packages in a Volkswagen (CT 325-326, 336-340). While some police remained at the Fortner residence and executed the search

warrant, other officers followed Riegler and his companions for two hours in the hope that they would lead them to other suspects. Finally, as the suspects approached the San Francisco Bay Area during the rush hour, the police, fearful they would lose the suspects in the heavy traffic, stopped the Volkswagen and arrested Riegler and his companions. The packages, which were in plain view in the back seat of the Volkswagen, were seized at the time of the arrest. The packages were in the same condition as they were before the delivery (CT 93, 131, 214-218, 227, 231-237, 322-325).

The packages were transported to Merced that evening where they were photographed and then opened and inventoried. A second search warrant was not obtained before the packages were reopened. The hashish was still in the packages. The

street value of the hashish was $100,000.

It was stipulated that the suspect substance was concentrated cannabis or hashish (CT 348-349).

ARGUMENT

I

AFTER A CUSTOMS SEARCH OF PARCELS SENT THROUGH THE INTERNATIONAL MAILS THE RECIPIENTS OF THE PACKAGES HAVE NO CONSTITUTIONAL PROTECTED EXPECTATION OF PRIVACY IN THE CONTENTS OF THE PACKAGES

On the basis of this Court's opinions in United States v. Chadwick (1977) 433 U.S. 1, Arkansas v. Sanders (1979) 442 U.S. 753, and Walter v. United States (1980) ___U.S.___; 100 S.Ct. 2395; 65 L.Ed.2d 410, the California Court of Appeal has erroneously concluded that the recipients of packages which have been subjected to a lawful warrantless customs search retain an expectation of privacy in the contents of the packages.

The Court of Appeal's misinterpretation of Chadwick, Sanders and Walter, involves substantial questions of a recurring nature involving the Fourth Amendment and

federal customs searches.

This Court recently upheld the constitutionality of customs searches of letters and parcels sent through the international mails. (United States v. Ramsey (1977) 431 U.S. 606.) When contraband is discovered during the course of a customs search, government agents frequently defer seizure of the contraband until by means of surveillance and a controlled delivery they identify those responsible for its unlawful importation. (United States v. Martinez (5th Cir. 1973) 481 F.2d 214, 218; United States v. Smith (9th Cir. 1980) 629 F.2d 1301; United States v. Bulgier (7th Cir. 1980) 618 F.2d 472.)

In this controlled delivery situation several federal circuits have held

that a search warrant is unnecessary to reopen the containers either because the contraband remains "constructively seized" (United States v. DeBerry (2d Cir. 1973) 487 F.2d 448, 451; United States v. Andrews (10th Cir. 1980) 618 F.2d 646), or because the reopening of the containers is part of a continuous transaction or extended border search. (United States v. Bulgier, supra, 618 F.2d at 478; United States v. Smith, supra 629 F.2d 1301; United States v. Martinez, supra, 481 F.2d at 218; United States v. Bilir (4th Cir. 1979) 592 F.2d 735; United States v. Lowe (6th Cir. 1978) 575 F.2d 1193; see also State v. Edwards (1977) 197 Neb. 354, 248 N.W.2d 775; McConnell v. State (1979) Alaska, 595 P.2d 147, 153-155.)

In this case, the Court of Appeal held the packages were no longer subject to a warrantless search because they had

been delivered to the addressee and they were seized a considerable distance from the delivery site. In so ruling, the Court of Appeal was directly in conflict with the federal cases cited which uphold extended border searches where constant surveillance and controlled delivery insure that the contraband remains with the suspects.

The Court of Appeal's erroneous ruling is in part a result of its misinterpretation of Walter v. United States, supra, ___U.S.___; 100 S.Ct. 2395, 65 L.Ed.2d 410. In Walter the majority, on First and Fourth Amendment grounds, held that a limited search of film parcels by private parties did not authorize government agents to screen the films without first obtaining a search warrant. The warrantless screening of the films was held to constitute a more intensive search of an exploratory or general nature.

This case differs from Walter in several respects. There was no screening of films or reading of messages that would introduce First Amendment considerations into the case. The initial search was lawfully conducted by government agents and it acted to deprive the recipients of the packages of any vestigial privacy interest in their contents. The second search did not exceed the scope of the initial search and merely constituted an inventory search rather than a general exploratory search.

Nothing in Walter or United States v. Chadwick (1977) 433 U.S. 1, supports the Court of Appeal's conclusion that citizens have an expectation of privacy in the contents of containers which have already been subjected to a lawful warrantless search by government agents.

The Court of Appeal's erroneous ruling is partially a result of its mis-

interpretation of People v. Whyte (1979) 90 Cal.App.3d 235, 152 Cal.Rptr. 280, cert. den. 444 U.S. 818. Whyte involved a customs search and a controlled delivery of contraband to the outside of a building housing several businesses. After the parcels were moved inside the business, the officers entered the business without a warrant, reseized the parcels and later reopened them. The evidence was ordered suppressed in Whyte because the officers needed a search warrant to authorize them to infringe on the privacy interests of the owners of the various businesses. (See People v. Matthews (1980) 112 Cal.App.3d 11, 24, 169 Cal.Rptr. 263.)

Petitioner does not contest the apparent rationale of Whyte that the police may not use a controlled delivery as a pretext for the warrantless invasion of the homes or businesses of third persons. How-

ever, that situation is not present in this case where the police had complied with Whyte by obtaining a search warrant for the Fortner residence. As events unfolded herein however, the packages were lawfully seized in appellant's automobile. (Harris v. United States (1968) 390 U.S. 234, 235.) Since the packages were in their original wrappings and had not been reopened, and since this was a continuous transaction with the contraband remaining in the constructive possession of the agents, there was no need to obtain a search warrant to authorize the officers to reopen the packages.

An additional basis for the warrantless reopening of these parcels is that the prior search of the packages had created a situation analogous to "plain view". Since the officers knew from the outward appearance of the packages that

they were the ones which contained the contraband, a search warrant was unnecessary. (Arkansas v. Sanders, supra, 442 U.S. 753, at 764-765, fn. 13.)

II

ONLY ONE SEARCH WARRANT IS CONSTITUTIONALLY REQUIRED TO OPEN CONTRABAND EVEN THOUGH THE EVIDENCE IS LAWFULLY SEIZED AT A DIFFERENT LOCALE THAN THAT DESCRIBED IN THE WARRANT

Assuming for argument's sake that a search warrant was necessary to authorize the police to reopen the packages, petitioner submits the Court of Appeal erred in concluding the original search warrant was not adequate authorization for the police to reopen the sealed packages.

It is indisputable that the police lawfully seized the packages in plain view at the time of respondent's felony arrest in his automobile. (See Harris v. United States, supra, 390 U.S. 234, 235; Chambers v. Maroney (1970) 399 U.S. 42, 52.)

The police had a search warrant authorizing them to search the Fortner residence. for the packages and to seize the packages,

their wrappers and contents. It is only reasonable to infer that this search warrant authorized the officers to open the packages.

It is absurd to conclude this warrant somehow expired because by chance the packages were not seized at the Fortner residence but in respondent's automobile at the time of the arrest.

Respondent's contention that a second search warrant is required is analogous to saying a separate search warrant is required for each container within a larger container. The federal courts have had no trouble dismissing such contentions as mere pedantry. (United States v. Callison (8th Cir. 1978) 577 F.2d 53, 55, cert. den., 439 U.S. 873; United States v. Kralik (10th Cir. 1979) 611 F.2d 343, 345; United States v. Morris (S.D. Georgia 1980) 491 F.Supp. 222; United States v. Abrahams (S.D.N.Y. 1980) 493 F.Supp. 310.)

Petitioner submits that as long as the police lawfully seized the packages, then the search warrant they had obtained authorized them to open the packages. The Constitution and this Court's decisions leave to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by a warrant--subject, of course, to the general Fourth Amendment protection "against unreasonable searches and seizures." (Dalia v. United States (1979) 441 U.S. at 257.)

Petitioner submits the decision of the police to delay execution of the search warrant was a commendable exercise of discretion. The police acted reasonably then and throughout the subsequent events.

In this case, to require the police to obtain a second search warrant based on the same probable cause as the first warrant

will not enhance any of the rights of privacy or personal freedom that the Fourth Amendment seeks to protect. It will only create needless repetitious work for courts and magistrates and strain our already overburdened legal system. It will also most assuredly confuse the police as to their obligations in regard to securing search warrants and needlessly require them to cope with legal refinements that strain credulity and defy reason.

III

ASSUMING THE SEARCH WARRANT DID NOT AUTHORIZE THE OFFICERS TO REOPEN THE PACKAGES, THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED BECAUSE OF THE OFFICERS' GOOD-FAITH BELIEF THEY WERE AUTHORIZED TO OPEN THE PACKAGES

Assuming for the purpose of argument that the officers were not authorized to open the packages in spite of the prior government search of the packages and the existence of a warrant authorizing the officers to search for and seize the packages and their contents, the evidence is uncontroverted the officers acted in the good-faith belief they were authorized to open the packages. Petitioner submits that in this rather unique situation, the application of the exclusionary rule is unwarranted.

The bulwark of the Fourth Amendment is the warrant clause. The fundamental

thrust of this requirement is that a search or seizure be conducted within the judicial process, i.e. with the prior approval of a judge or magistrate. (Coolidge v. New Hampshire (1971) 403 U.S. 443, 454-455.) The rule excluding evidence obtained without a warrant (subject to a few specifically established and well-delineated exceptions) is simply an attempt to effectuate this requirement (Rakas v. Illinois (1978) 439 U.S. 128, 134; United States v. Calandra (1974) 414 U.S. 338, 347; Elkins v. United States (1960) 364 U.S. 206, 217.), or, as has otherwise been stated, to deter unlawful police conduct. (Linkletter v. Walker (1965) 381 U.S. 618, 636.)

In the instant case, the officers made every effort to reasonably comply with the requirements of the law in effect at the time.

The officers obtained a search

warrant for the packages and their contents. Since there were no prior cases holding a second warrant was necessary and since the officers already knew, from a prior legal search, the contents of the packages, the officers cannot be faulted for believing, in good faith, that a second warrant was unnecessary.

The officers in this case work in the field. They are not and should not have to be legal scholars attuned to every nuance and development in the law. The application of the exclusionary rule in this situation would serve no useful purpose and would only add to the confusion which surrounds the law in this area. If this decision is allowed to stand, there is no foreseeable limit for the number of search warrants which will be required of the police to search the same item of contraband.

In view of the fact the officers had applied for and obtained a warrant and had acted in the good-faith belief this warrant authorized them to reopen the packages, no useful purpose would be served in this case by applying the exclusionary rule. (United States v. Williams (5th Cir. 1980) 622 F.2d 830, 840 et. seq.)

CONCLUSION

The decision of the California Court of Appeal is a serious erosion of the bulwarks of the interpretation and application of the Fourth Amendment: reasonableness and the avoidance of hypertechnical rules. The obsessive formalism of the decision imposes an impossible burden on law enforcement. It serves no legitimate privacy interests and should not be allowed to

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stand. We respectfully submit that a writ of certiorari should issue to review the decision of the Court of Appeal.

Respectfully submitted,

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APPENDIX A

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. ROBERT LAWRENCE RIEGLER, Defendant and Respondent.	5 Crim. No. 4230 (Super. Ct. No. 9648) O P I N I O N

APPEAL from a judgment of the Superior Court of Merced County. Donald R. Fretz, Judge. Reversed.

Eugene Seltzer, Attorney for Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Roger E. Venturi and Ramon M. de la Guardia, Deputy Attorneys General, for Plaintiff

and Respondent.

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SEE CONCURRING OPINION

In this case we consider the applicability of the container decisions to wrapped and sealed packages arriving by overseas mail which are opened by customs officials, resealed, delivered in a controlled delivery with a search warrant for the residence of the addressee, seized in a vehicle approximately 100 miles from that residence, returned to the city of the addressee, and subsequently opened by law enforcement officers without first obtaining a search warrant to open the packages. We conclude that while the seizure was proper, the warrantless search was not.

In the instant case Riegler pled guilty to a charge of possession of marijuana for sale after his motion to suppress

was denied. He appeals asserting error in denial of the suppression motion.

The facts are these:

On November 8, 1977, a customs inspector at JFK Airport in New York City notified John Huber, a special agent with the Drug Enforcement Administration, that a detector dog had alerted the inspector to two packages sent from Germany and when the inspector opened them up he observed what he believed to be hashish.

Chemical analysis confirmed that the substance was hashish.

The packages were addressed to Selma and Mike Fortner, 1130 W Street, Merced, California.

The packages were resealed by the customs agent and Huber sent the packages to Patrick Dorn, a United States postal inspector in Fresno who received them on

November 21, 1977.

Dorn brought the packages to Merced and contacted a Lieutenant Moore who was in charge of specialized manpower assigned to crime control (SMACC) in Merced County. Huber also had contacted Moore on November 21, 1977, and told him about the packages.

The plan was to have a controlled delivery and Agent Atkins with SMACC obtained a search warrant on November 22, 1977, for the premises at 1130 W Street.

On November 22nd, Lieutenant Moore and other agents took up surveillance at the Fortner residence. At approximately 1:30 Dorn gave the parcels to the regular mail carrier who delivered the parcels at approximately 1:40 and Michael Fortner took them.

About ten to fifteen minutes after the delivery of the packages a red Volks-

wagen pulled into the driveway at the Fortner residence.

Lieutenant Moore testified that between 1:40 and 2:11, when Riegler drove the Volkswagen away with the packages, nothing prevented Moore from going into the residence to execute the warrant. He did not immediately serve the warrant because he wanted to wait for the occupants to have time to open the package. He was also interested in where the hashish was going if it left the residence. He wanted to ascertain who else was involved in the case and whether he could arrest more people. He would follow suspects wherever they went, including on a plane.

Before the vehicle left, the packages were placed in the Volkswagen but a SMACC agent could not tell if both packages were put in.

After the Volkswagen left, the war-

rant was executed and served on Mike Fortner at 2:30, and the house searched, but nothing incriminating was found. Agent Austin overheard Michael Fornter on the phone say that a couple of packages came for Bob and "I gave them both to Bob."

The search warrant was apparently restricted to the premises, structures, rooms and receptacles of the Fortner residence at 1130 W Street, Merced, and did not provide for the search of any vehicle or persons.

When the vehicle left the Fortner residence SMACC agents including Moore, along with postal inspector Dorn, followed. Although several opportunities existed to detain the occupants, the officers chose not to do so until approximately 4:05 p.m., at which time the vehicle was stopped in Contra Costa County approximately 100 miles from the Fortner residence. The reason

for the stop then was the fear of losing surveillance in East Bay traffic.

Riegler and a codefendant (Bannister) exited the vehicle and were arrested. Moore observed two packages in the back seat of the Volkswagen. The packages were identified as being the same ones previously seized, opened, rewrapped and delivered. The packages did not appear to have been opened after delivery to the Fortner residence. The seized packages were taken to the SMACC office in Merced where they were photographed and opened and found to contain hashish valued at approximately $100,000. No search warrant was obtained before the opening. Moore testified that when he took the packages back to the Merced office, he had no fear that something would happen to the packages.

Relying on United States v. Chadwick (1977) 433 U.S. 1, People v. Minjares

(1979) 24 Cal.3d 410, and their progeny of container cases, Riegler asserts that a search warrant for the packages should have been obtained before the packages were opened in Merced. We agree.

We reject the contention that Riegler had a lesser expectation of privacy in the packages on the theory that the packages were initially subject to customs search. The packages were securely wrapped and sealed with no labels or markings to indicate the character of their contents. As the United States Supreme Court said in Walter v. United States (___ U.S. ___, 100 S.Ct. 2395, 2402, footnote 12 (lead opinion):[1/]

1/ Walter was a 5-4 opinion. In Walter there had been an interstate shipment of several secured sealed packages containing eight-millimeter films apparently depicting homosexual activities. This shipment was mistakenly delivered by a (continued)

". . . it is difficult to understand how petitioner's subjective expectation of privacy could have been altered in any way by the subsequent events of which they were obviously unaware."

At the very least in this case there

Footnote 1 continued.

private carrier to a third party rather than the consignee. Employees of the third party opened each of the packages. Inside were individual film boxes on one side of which were suggestive drawings and on the other explicit descriptions of the contents. The Federal Bureau of Investigation was notified and picked up the packages. The films were viewed with a projector without first obtaining a warrant. Mr. Justice Stevens joined by Mr. Justice Stewart concluded that the government's unauthorized screening of the films without a warrant violated the Fourth Amendment. Mr. Justice White joined by Mr. Justice Brennan concurred but also held that the subsequent screening by the government was an independent governmental search without regard to the previous private screening and agreed that even if the private parties had projected the films before turning them over to the government, the government still would have been required to obtain a warrant for its subsequent screening of them. (See conc. opn. ___ U.S. ___, 100 S.Ct. 2404.)

was an expectation that when the packages arrived at the Merced address the contents would remain private. The partial invasion of privacy by customs did not automatically justify a total invasion. In the words of Walter (___ U.S. ___, ___, 100 S.Ct. 2395, 2403):

> "It did not simply strip the remaining unfrustrated portion of [the] expectation of all Fourth Amendment protection." (Fn. omitted.)

Of course, the expectation of privacy means more than a subjective expectation. The expectation must be reasonable. Under the present standards enunciated in Chadwick, Sanders, Minjares, Dalton (United States v. Chadwick, supra, 433 U.S. 1; Arkansas v. Sanders (1979) 442 U.S. 753; People v. Minjares, supra, 24 Cal.3d 410; People v. Dalton (1979) 24 Cal.3d 850) and their respective progeny, we cannot say that the expectation here was un-

reasonable. Under the factual circumstances present in this case, we conclude there was a justifiable expectation of privacy against unwarranted intrusion. Essentially an important element in these cases is foreseeability which is implicit in an analysis of subjective expectations. Here, the government should have anticipated a reasonable claim of privacy. (See United States v. Rivera (N.D. Tex. 1980) 486 F.Supp. 1025, 1034.)

Rather than placing on the law enforcement officer on the street the difficult, if not impossible burden, of carrying a list of "searchable parcels," we believe that the standard to be followed by the officer is the one which was succinctly stated by Federal Judge Higginbotham in Rivera, supra, idem as follows:

> ". . . If the contents of a sealed package or parcel are not revealed by the

> package and you have exclusive control with no fear of harm from its contents -- obtain a warrant." (Emphasis added.)

The packages were no longer subject to a warrantless search once they were delivered. (See People v. Whyte (1979) 90 Cal.App.3d 235; but see United States v. Bulgier (7th Cir. 1980) 618 F.2d 472.) This is particularly true when as here considerable time had passed and the packages had been transported such a distance by the recipients or others. Not only had a considerable period passed from the time the vehicle left Merced and was finally stopped and the packages seized, but additional time (some four to five hours) also passed after the seizure of the packages and their subsequent opening at Merced.

The Attorney General argues that the warrant obtained for the house should be adequate to authorize the opening of the

sealed packages. We are not persuaded. The warrant which was obtained did not authorize (and properly could not so authorize under the Fourth Amendment) seizure of the packages at any place where found.

Nor do we believe that the police were entitled to search the seized packages without a warrant because "their contents could be inferred from their outward appearance." (Arkansas v. Sanders, supra, ___ U.S. ___, 99 S.Ct. at 2593, fn. 13.[2/])

2/ The footnote reads:

"Not all containers in packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view' thereby obviating the need for a warrant. [Citation.] There will be difficulties in determing which parcels taken from an automobile require a warrant and which do not." (Emphasis added.)

The fact that the police had ample probable cause to believe and perhaps even knew that the packages contained contraband does not mean their contents were apparent from the outside.

The meaning of the somewhat cryptic[3/] footnote in Sanders need not concern us in this case. This is factually not a situation where the packages "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance."

The vehicle here was properly stopped and the packages were properly seized. However, the fact that the packages were

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3/ It is not clear from the Sanders footnote whether or not the United States Supreme Court in the italicized sentence (see fn. 2, supra) is really making an exception to the requirement of a warrant substantially different from the "plain view" exception. Perhaps, it is merely an extension of the "plain view" exception.

lawfully seized does not validate a warrantless search of the contents. While there was ample probable cause for the police officer's belief that the packages contained contraband, there were no exigent circumstances justifying the failure to secure a warrant for the search of those packages.

Some may consider the warrant requirement to be unnecessary surplusage in this situation. However, "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" (Mincey v. Arizona (1978) 437 U.S. 385, 393.) As the California Supreme Court said in People v. Minjares, supra, 24 Cal. 3d 410, 420-421:

> "When those circumstances cease to exist the exception also ceases to exist and a warrant must be obtained. This is the rationale of Chadwick: 'Even though on this record the issuance of a warrant by a judicial officer was reason-

ably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority.' ([Citation], italics added.) To hold otherwise would exalt the exceptions above the rule." (Fn. omitted.)

The same viewpoint is set forth by our Supreme Court in People v. Dalton, supra, 24 Cal.3d 850, 860:

"The warrant requirement is not an empty formality. It is the cornerstone of the Fourth Amendment's guarantee of the right to privacy. The assurance that a determination of probable cause will be made by a neutral and detached magistrate, rather than an officer under stress in the field is not a minor guarantee. [Citation.] The authority of the executing officer and his need to search are carefully reviewed. [Citation.] Limits are imposed on the search through the requirement of particularity. [Citation.] And the factual basis on which the affiant is justifying the search is made in advance of the search itself. This ensures that a search will not

be impermissibly justified by what it turns up. [Citation.] These important protections would be undermined by the adoption of a rule that would encourage officers to conduct a search at the time of the seizure of personal effects, rather than requiring them to obtain a warrant. [Citations.]"4/

4/ One of the citations in Dalton is to the United States Supreme Court opinion in Johnson v. United States (1948) 333 U.S. 10, 13-14. While that quote has been often set forth in full (see, for example, Chapman v. United States, (1961) 365 U.S. 610, 614-615), the statement written by Mr. Justice Jackson over 32 years ago still bears repeating in full. It reads:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the

(continued)

In examining the record in this case, we find no exigent circumstances that would authorize a warrantless search of the packages. The motion to suppress should have been granted. Whether or not there remains sufficient evidence to retry Riegler is a matter initially for the prosecution, and we express no opinion

---

Footnote 4 continued.

> Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (Fn. omitted.)

thereon at this time.

The Attorney General argues that the suggested procedure in People v. Haybron (1980) 108 Cal.App.3d 31, footnote 2, should be applied here and the container could be brought into court and then opened under judicial authorization. That suggested procedure was completely unnecessary to the decision in Haybron. Additionally Haybron arose in a Penal Code section 995 setting and the court concluded at page 40 that even in the absence of the evidence obtained via the warrantless search there was probable cause to hold the defendants to answer. Furthermore, the suggested procedure does not consider the facts of the Fourth Amendment violation. The thrust of the container cases is to prevent warrantless searches. The Haybron procedure, in effect, would turn the rule on its head and cir-

cumvent the Fourth Amendment violation. We reject the use of such a procedure in this case.

In light of our conclusion we need not consider any other contention of eror made by Riegler.

The judgment is reversed.

HOPPER, J.

I CONCUR:

BROWN (GEO. A.), P.J.

SEE CONCURRING OPINION

THE PEOPLE v. ROBERT LAWRENCE RIEGLER

5 Crim. No. 4230

CONCURRING OPINION BY ANDREEN, J.

I concur because of the authority of People v. Whyte (1979) 90 Cal.App.3d 235, but write to express a question as to the wisdom of the law stated therein.

The majority in this case holds that the seizure of the packages was proper, but that a subsequent search of the contents could only follow the issuance of an additional warrant. The People's argument that defendant had a lesser expectation of privacy because the packages were subject to a customs search is rejected. It is difficult to understand why. Once it was determined that the material was contraband, the packages could move through the U.S. Mail only by virtue of governmental authorization.

If it were not for Whyte, I would argue that the packages were in the constructive possession of law enforcement from the time of the opening of them at JFK Airport until the stop in Contra Costa County. For an example of this approach, see United States v. DeBerry (2d Cir. 1973) 487 F.2d 448. It is recognized that the argument for constructive possession is weakened once there was a delivery of the material to the Fortner residence in Merced. The problem is not insurmountable, however, if one remembers that the authorities had a right to immediate seizure of the packages. They delayed that act in a commendable attempt to increase the size of their catch, but their immediate right to possession gave them continued constructive control.

I think that the approach in DeBerry would simplify the task of law enforce-

ment without derogating from the values protected by the Fourth Amendment's prohibition of unreasonable searches and seizures.1/

ANDREEN, J.

1/ """My basic premise is that Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."' LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup.Ct.Rev. 127, 141 (footnotes omitted), quoting United States v. Robinson, 153 U.S. (continued)

Footnote 1 continued.

App.D.C. 114, 154, 471 F.2d 1082, 1122 (1972) (dissenting opinion), rev'd, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).'" (United States v. Chadwick (1977) 433 U.S. 1, 22, fn.3 (dis.opn. of Blackmun, J.).)

APPENDIX B

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
F I L E D
NOV 25 1980
KEVIN A. SWANSON, Clerk
By_____
Deputy

THE PEOPLE,
Plaintiff and Respondent,

vs. 5 CR No. 4230

ROBERT LAWRENCE RIEGLER,
Defendant and Appellant.

BY THE COURT:

The Petition for Rehearing is denied.

(Andreen, J. would grant the petition.)

Dated NOV 25 1980

BROWN (GEO. A.) P.J.

APPENDIX C

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
5th District, Division___, Crim. No. 4230

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE

v.

RIEGLER

SUPREME COURT
F I L E D
DEC 24 1980
LAURENCE P. GILL,
Clerk
R. Nicco, Deputy

Respondent's petition for hearing DENIED.

Mosk, J., Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

BIRD Chief Justice

I, LAURENCE P. GILL, Clerk of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.
Witness my hand and the seal of the Court this ___ day of JAN 23 1981
Clerk
By R. NICCO
Deputy Clerk

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SUPREME COURT, U.S.

NO. 80-1421

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT LAWRENCE RIEGLER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (28 U.S.C. §1915, Rule 46)

Respondent, ROBERT LAWRENCE RIEGLER, by and through his attorney, Eugene Seltzer, moves the court for an order permitting him to proceed in forma pauperis, pursuant to the provisions of Title 28, United States Code, Section 1915, and in support thereof attaches the affidavit of said appellant.

EUGENE S. SELTZER
Attorney for Respondent

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NO. 80-1421

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT LAWRENCE RIEGLER,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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NO. 80-1421

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT LAWRENCE RIEGLER,

Respondent.

RESPONSE IN OPPOSITION

TO

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent ROBERT LAWRENCE RIEGLER, through his attorney, respectfully requests that this Court deny the Petition for Writ of Certiorari requested by the People of the State of California after the decision by the Court of Appeal, Fifth Appellate District, reversing the conviction of Respondent and the order denying the motion to suppress evidence.

STATEMENT OF THE CASE

AND

STATEMENT OF FACTS

Respondent hereby incorporates the Statement of the Case contained in the Petition for Writ and incorporates by reference the summary of the record of the case as described in the Opinion of the California Court of Appeal (Petition, Appendix A, pages 3-7).

STATUTORY PROVISIONS INVOLVED

Constitution of the State of California

Article I

§ 1. Inalienable rights
Section 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.
(Added Nov. 5, 1974.)

§ 13. Searches and seizures; warrant
Section 13. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

§ 24. Rights not dependent on federal constitution; rights reserved to people

Section 24. Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.
This declaration of rights may not be construed to impair or deny others retained by the people.
(Added Nov. 5, 1974.)

PETITIONER'S CONTENTIONS SUMMARIZED

1. No search warrant is required in the setting of a "controlled delivery" after a Customs search of a mailed parcel.

2. A Customs search of a mailed parcel strips the addressees and subsequent recipients of any expectation of privacy in the parcel.

3. Even if a warrant was required for the package, the warrant obtained for the Fortner residence justified the search and seizure of the package at a different location.

4. The exclusionary rule should not be applied where police officers are in mistaken, but good faith, belief that they are complying with the law.

RESPONDENT'S CONTENTIONS

1. A search warrant is required in the "controlled delivery" setting under California law.

2. A Customs search of a package, unknown to the addressee or recipient, does not diminish the recipient's reasonable expectation of privacy.

3. A search warrant for a residence and things located therein does not justify the search of things seized elsewhere and searched elsewhere.

4. A "good faith" exception to the Exclusionary Rule would encourage ignorance of the law.

ARGUMENT

I. A SEARCH WARRANT WAS REQUIRED TO SEARCH THE MAILED PARCELS.

Under California law, a search warrant is required in the "controlled delivery" setting. People v. Whyte, 90 CA. 3d 235, 243 [citations] (1979); Cert. den. 444 U.S. 1093 (1980). In the case at bar, the actual search of the package was conducted by state agents after federal agents and customs authorities had relinquished control over the alleged contraband. Moreover, the "controlled delivery" here involved loss of visual contact and control over the movement of the packages for well over three hours and a distance of over one hundred miles. In fact, the investigating officers "lost" the packages in the Merced residence and did not know if one or both of the parcels had been moved from the residence to the vehicle which transported them across the State of California. (Petition, Appendix, Page 5).

The parcels cannot be said to have been in transit to the addressee after their delivery to the private residence. Thus, under the rule of Whyte, Supra, Petitioner cannot rely on the authority of the federal and customs agents who had previously opened the packages to justify the subsequent search of them. Id.

It is debatable whether there is a federal rule that obliterates the warrant requirement in the case of a "controlled delivery." Of those cases cited by Petitioner, it is notable

that there was always a constant visual contact or actual control over contraband in transit. Eg: United States v. Bulgier, 618 F.2d 472 (7th Cir. 1980). But regardless, the California standard is controlling where state agents are involved, even if that standard is more strict than the federal rule. Cooper v. California, 386 U.S. 58, 62 (1967).

In California, there is not only the California Constitution, Article I, Section 13, which almost verbatim copies the language of the Fourth Amendment, but we also have the general penumbra rights of privacy [Article I, Section 24]; People v. Brisendine, 13 Cal. 3d 528 (1975)] as well as an express right of privacy (Article I, Section 1). Where a state court's opinion relies on provisions in both the state and federal constitutions that are similar, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving the Supreme Court of jurisdiction to review the state judgment. Jankovich v. Indiana Toll Road Commission, 397 U.S. 487, 491-492 (1965). Respondent asserts that the California line of authority requiring warrants in the "controlled delivery" setting and the opinion below are based on authority and rules of law that flow from the California Constitution as it pertains to rights of privacy and freedom from unreasonable search and seizure. There is, therefore, a sufficient ground and adequate basis in California law to sustain the judgment and to deny certiorari.

Nor does Petitioner's reliance on the "border search" cases obviate the need for a warrant. It simply cannot be maintained that a package which goes through Customs in New York City is subject to a "border search" on the California Coast weeks later. See United States v. Almeida-Sanchez, 413 U.S. 266 (1973).

The argument that the package was still in constructive possession of federal, or even state agents must fail on another ground as well. The Respondent is charged with possession of marijuana for sale. The government may not claim that it had sufficient dominion over the marijuana to obviate Respondent's Fourth Amendment or California Constitutional rights while at the same time it is prosecuting him for a crime in which possession of the seized evidence is itself an essential element. "Proper administration of criminal justice should not include such contradictory assertions of governmental power." United States v. Kelly, 529 F.2d 1365, 1370-71 (8th Cir. 1976).

II. THE CUSTOMS SEARCH DID NOT DEPRIVE THE RECIPIENT OF A REASONABLE EXPECTATION OF PRIVACY.

There is no authority nor logical basis by which to support Petitioner's argument that a prior search of an object, unknown to the recipient, deprives him of a reasonable expectation of privacy in it thereafter. Walter v. United States, ___U.S.___; 100 S.Ct. 2395,2402 fn. 12, 2403 (1980), (lead opinion). Compare United States v. Andrews, 618 F.2d 646, 652 (1980) where the recipient had been advised by a federal agent that the contents of the package were known to authorities before the recipient accepted delivery of the package.

The case at bar does indeed differ factually from Walter, Supra. But Walter does not stand for the above proposition that Petitioner claims. As asserted by the California Court of Appeal in its opinion herein, an important element in the inquiry with respect to reasonable expectation of privacy is the foreseeability of a claim of privacy. Here, the packages were re-wrapped after the Customs search to look just as they did before the search, in an effort not to alert the suspects that a search had been performed. In effect, the government was trying to foster an expectation of privacy. Thus, the government

cannot now claim that a claim of expected privacy was not foreseeable. See United States v. Rivera, 486 F.Supp. 1025, 1034 (N.D. Tex. 1980).

The recipient had no way of knowing that the outward appearance of the package somehow inferred its contents. The package was wrapped in an inconspicuous manner and the "plain view" exception of Arkansas v. Sanders, 442 U.S. 753, 764-765 fn. 13 (1979) does not apply to diminish a reasonable expectation of privacy. Indeed, except to the investigating agents, the outward appearances of the mailed parcels gave absolutely no clue as to their contents.

III. THE SEARCH WARRANT DID NOT AUTHORIZE THE SEIZURE OR OPENING OF THE PACKAGES.

As indicated in the Opinion of the California Court of Appeal in the Petition herein (Appendix A, page 6) and according to the record in the case:

> The search warrant was apparently restricted to the premises, structures, rooms and receptacles of the Fortner residence at 1130 W Street, Merced, and did not provide for the search of any vehicle or persons.

Under Section 1525 of the Penal Code of California and Article I, Section 13 of the State Constitution:

> A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the persons and particularly describing the property and the place to be searched [emphasis added].

The particularity requirement has been interpreted strictly by California Courts:"... the constitutional requirement that a warrant particularly describe the place to be searched compels the conclusion that the privilege to search created by a warrant does not extend beyond the place or places described therein." People v. Dumas, 9 Cal.3d 871, 880 (1973). In Dumas, officers had a warrant to search for stolen documents in a particular house. They executed the warrant in the house and found no documents, but did find them in a car parked in front of the house.

The Supreme Court of California specifically held that the search and seizure of the documents was not authorized by the search warrant although other, exigent circumstances allowed for a warrantless search of the car.

Respondent contends that it is not absurd to conclude that the search warrant here did not justify a search and seizure that began over one hundred (100) miles from the place described to be searched by the warrant. Nor does Respondent contend that a separate warrant be obtained for each item that would have been seized from the residence where the warrant authorized a search. Such a conclusion does not follow from the judgment of the Court below. It simply restricts that authority of the warrant to the place specifically described in it.

Likewise, the legitimacy of the seizure of the package does not authorize its opening and search without a warrant. United States v. Chadwick, 433 U.S. 1 (1977). Nothing is disclosed in the record that would have prevented the seizing agents here from obtaining a warrant in the normal course of business. To argue that obtaining a warrant would cause additional burdens to the legal system simply begs the question as to the need for the warrant requirement. It would appear that such questions have long since been put to rest. Id.

IV. A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE WOULD REWARD IGNORANCE OF THE LAW.

Petitioner complains that suppression in this case will lead to overwhelming confusion for the police officer in the field. As pointed out in the Opinion of the California Court of Appeal (Petition, Appendix A, page 11), there is a simple rule that has been enunciated that removes all confusion. Rivera, Supra, 486 F.Supp. at 1034.

The exclusionary rule has evolved to enourage police practice in conformity with the law. To permit "good faith" oversights and/or ignorance of the law to be an exception to the exclusionary rule would simply create an incentive to keep police blissfully ignorant of the law.

Moreover, it would create an entire new field of inquiry in the area of search and seizure. In many cases the issue of the subjective knowledge and the good or bad faith of a police officer will have to be litigated. Ascertaining the subjective intent and the moral quality of an officer's action is well nigh impossible in any event.

CONCLUSION

The California Court of Appeal correctly decided that the warrantless search of the mailed parcel was improper under California law.

A warrant was required because it is required in any event according to California law in the "controlled delivery" setting and because the mailed parcel here had actually been delivered and was no longer in control of the delivering officers.

The warrant issued for the search of the residence cannot be the source of authority to search an object searched and seized away from the residence.

For these reasons, Respondent submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Eugene S. Seltzer

EUGENE S. SELTZER
Law Offices of Duane, Lyman & Seltzer

PROOF OF SERVICE

I am a citizen of the United States and am employed in the City and County of San Francisco, State of California; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2000 Center Street, Suite 303, Berkeley, California 94704.

On March 19, 1981, I served the within Response in Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis on the Attorneys for Petitioner in said action by placing three true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Berkeley, California, addressed as follows:

MR. GEORGE DEUKMEJIAN,
Attorney General
State of California

MR. ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General
Criminal Division

MR. ARNOLD O. OVEROYE
Assistant Attorney General

Mr. RAMON M. de la GUARDIA
Deputy Attorney General

555 Capital Mall, Suite 350
Sacramento, California 95814

I, HELEN P. IWAMOTO, declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of March, 1981, at Berkeley, California.

Helen P. Iwamoto
HELEN P. IWAMOTO